

MERGER NOTIFICATION AND PROCEDURES TEMPLATE

ZAMBIA

May 2009

IMPORTANT NOTE: This template is intended to provide initial background on the jurisdiction's merger notification and review procedures. Reading the template is not a substitute for consulting the referenced statutes and regulations.

1. Merger notification and review materials (please provide title(s), popular name(s), and citation(s)/web address)

A. Notification provisions	Sections 7(2)(f) and 8 of the Competition and Fair Trading Act, 1994 (the Act).
B. Notification forms or information requirements	Pre –Merger Notification ZCC Form 5.
C. Substantive merger review provisions	Sections 8(1) and 8(2) of the Competition and Fair Trading Act, 1994.
D. Implementing regulations	None in the formal context at the moment (except for the Notification Fees) but there is a requirement to formalise regulations under Section 17 of the Act.
E. Interpretive guidelines and notices	Merger and Notification Guidelines and Competition Rules in Zambia.

2. Authority or authorities responsible for merger enforcement.

A. Name of authority. If there is more than one authority, please describe	Only the Zambia Competition Commission (ZCC or “the Commission”).
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allocation of responsibilities.	
B. Address, telephone and fax (including country code), e-mail, website address and languages available.	Zambia Competition Commission 4 th Floor Main Post Office Building P.O. Box 34919 Lusaka, Zambia Tel: +260 1 222787 /260 1 232657 Fax: +260 1 222789 Inquiries: The Executive Director E-mail: zcomp@zamtel.zm Website: www.zcc.com.zm Website language: English
C. Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.	YES. The first point of contact is the Executive Director on the address and numbers shown above. The Director – Mergers & Monopolies and the directorate staff are accessible on the same contact details.

3. Covered transactions

A. Definitions of potentially covered transactions (i.e., concentration or merger)	Generally, merger notification concerns a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services, or a takeover of one or more such enterprise by another enterprise, or by a person who controls another such enterprise.
B. If change of control is a determining factor, how is control defined?	Change of control is not necessarily a determining factor but may be influential in the case of transfer or ownership of shares in control of management or potentially possible unilaterally or collusively to influence corporate policy or provide competitive advantage over rivals.
C. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels?	YES. They are considered if they give the acquirer an influential and or dominant control through management or corporate policy of an enterprise. Generally, any stock acquisition above 40% will be covered. As regards minority shareholding in rival or potentially rival firms (i.e. competitors) these generally raise competition concerns, prima facie. Clearance by the Commission would be mandatory.
D. Do the notification requirements cover joint ventures? If so, what types (e.g., production joint ventures)?	YES, Section 7(2)(f) of the Act mentions mergers, takeovers, joint ventures or other acquisitions of control whether horizontal, vertical or conglomerate in nature for dominant firms. The Commission still reserves the right to request non-dominant firms to notify their joint ventures, if so required.

4. Thresholds for notification

<p>A. What are the general thresholds for notification?</p>	<p>In Zambia, the general thresholds are:</p> <ol style="list-style-type: none"> 1. Where the object or the effect of the transaction is to prevent, restrict or distort competition in Zambia or any substantial part thereof; 2. The parties involved are independent entities; 3. Any of the parties to the transaction is engaged in trade or commerce or other commercial business activity in Zambia; 4. The parties produce or distribute substantially similar goods or services; and 5. Any of the parties is a dominant firm.
<p>B. To which entities do the merger notification thresholds apply, i.e., which entities are included in determining relevant undertakings/firms for threshold purposes? If based on control, how is control determined?</p>	<p>Under Statutory Instrument No. 46 of 2006 mergers between SMEs are exempted from notification. All other firms not classified as SMEs under the Small Enterprise Development Act, CAP 425 of the Laws of Zambia have to, prima facie, notify the Commission for authorisation.</p>
<p>C. Are the thresholds subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and how frequently.</p>	<p>The statutory thresholds in the Act are largely qualitative and thus not per se adjusted regularly. However statutory instruments can be adjustable regularly at the recommendation of the Commission to the Minister under Section 17 of the Act when adverse inflationary changes occur.</p>
<p>D. To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?</p>	<p>Largely total assets or turnover as presented in at least the last three (3) annual audited financial statements.</p>
<p>E. Describe the methodology for identifying and calculating any values necessary to determine if notification is required, including the value of the</p>	<p>No method is generally used to identify and calculate any values necessary to determine if notification is required on the basis that Zambia follows the mandatory pre-merger notification procedure.</p> <p>However, an annual turnover of less than K 100 million (i.e. US\$ 25,000) is used as an SME benchmark to exempt SMEs from notification. Prima facie, all firms with more than US\$ 25, 000 per annum turnover have to notify.</p>

transaction, the relevant sales or turnover, and/or the relevant assets?	
F. Describe methodology for calculating exchange rates.	The prevailing Kwacha (local currency) exchange rate, as set by the Bank of Zambia (www.boz.gov.zm) in relation to major currencies like US Dollar, British Pound and the Euro is used.
G. Do thresholds apply to worldwide sales/assets, to sales/assets within the jurisdiction, or both?	No, largely applied to assets within our jurisdiction, and to an increasing extent to those in neighbouring countries (the Southern African Region).
H. Can a single party trigger the notification threshold (e.g., one party's sales, assets, or market share)?	Yes, if one of the parties to the merger is a significant player in a relevant product market.
I. How is the nexus to the jurisdiction determined (e.g., sales or assets in the jurisdiction)? If based on an "effects doctrine," please describe how this is applied. Is there a requirement of local presence (local assets/affiliates/subsidiaries) or are import sales into the jurisdiction sufficient to meet an "effects" test?	<p>It is largely based on an "effects doctrine" as presented in Section 7(1) and (2) of the Act. Application is by way of consideration of factors such as:</p> <ul style="list-style-type: none"> • The market concentration ratio (CR3) or the Herfindahl Hirschman Index (HHI) as used in the US Horizontal Merger Guidelines; • Barriers to entry; • Removal of a competitor; • Levels of import competition; • Availability of substitutes; • Countervailing power; • Vertical linkages; • Effective remaining competition; etc <p>A requirement of locally established presence is pertinent, direct or indirectly. Significant import sales would be sufficient to meet the "effect" test.</p>
J. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?	Sales are largely allocated where the customer is concentrated in order to determine "the relevant geographical market".
K. If market share tests are used, are there guidelines for calculating market shares?	Generally, annual gross turnover figures for the market players are used as presented in the audited accounts of the parties. Industry reports, where available, are also used e.g. central bank annual report.
L. Are there special	There are no special thresholds.

threshold calculations for particular sectors (e.g., banking, airlines, media) or particular types of transactions (e.g. joint ventures, partnerships, financial investments)?	
M. Are any sectors excluded from notification requirements? If so, which sectors?	Notification is excluded for transactions taking place between small medium enterprises as enshrined in the Small Enterprise Development Act, 1996, CAP 425 of the Laws of Zambia.
N. Are there special rules regarding jurisdictional thresholds for transactions in which both the acquiring and acquired parties are foreign?	There are no special rules.
O. Does the agency have the authority to review transactions that fall below the thresholds?	YES.

5. Notification requirements and timing of notification

A. Is notification mandatory pre-merger?	YES
B. Is notification mandatory post-merger?	Lack of authorization of a merger makes it null and void ab initio. Parties have to formally notify post-merger to seek authorization (see Section 8 (1) and 8(2) of the Act).
C. Can parties make a voluntary merger filing even if filing is not mandatory? If so, when?	Yes, prior to merging as per Section 8 of the Act.
D. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; if so, when is an agreement considered	As soon as either party intend to merge with or takeover another (due to mandatory pre-notification requirement). Letter of intent to this effect would be sent to the Commission without a definitive agreement reached by the parties. After receipt of such letter, the Commission would advise the parties accordingly.

definitive?)?	
E. Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the event. Do the deadline and triggering event depend on the structure of the transaction? Are there special rules for public takeover bids?	No, Notification has to be made prior to signing the definitive agreement.
F. Can parties request an extension for the notification deadline? If yes, please describe the procedure and whether there is a maximum length of time for the extension.	Yes, parties can request for an extension by writing a letter preferably jointly or through a joint representative to the Commission e.g. to indicate that they are yet to complete negotiations, due diligence, other formalities etc. There is no prescribed maximum but such extension would ordinarily not exceed the date of signing the definitive agreement between the parties.

6. Simplified procedures

Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, discretion to waive certain responses, etc.).	Transactions that do not raise competition concerns may be notified under “Negative Clearance”, as adapted from the European Union competition regulations. This is an administrative action to allowing such transactions to be effected without necessarily going through formal or vigorous assessment procedure. Such clearance may even take less than a week.
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7. Documents to be submitted

A. Describe the types of documents that parties must submit with the	<ul style="list-style-type: none"> • Notification form “ZCC Form 5”. • Notification fee. • Financial statements for the past two to three years or annual reports (if available).
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notification (e.g., agreement, annual reports, market studies, transaction documents).	<ul style="list-style-type: none"> • The sale or purchase agreement. • Relevant documents e.g. press releases, Board resolutions, industry report etc.
B. Are there any document legalization requirements (e.g., notarization or apostille)?	Generally as practiced in the English Common Law system.
C. Are there special rules for exemptions from information requirements (e.g. information submitted or document legalization) for transactions in which the acquiring and acquired parties are foreign?	No, there are no special rules for exemption from information requirements.

8. Translation

A. In what language(s) can the notification forms be submitted?	Only in English, which is the official language in Zambia.
B. Describe any requirements to submit translations of documents with the initial notification, or later in response to requests for information, including the categories or types of documents for which translation is required, requirements for certification of the translation, language(s) accepted, and whether summaries or excerpts are allowed in lieu of complete translations.	There are no requirements to submit translation of documents in foreign language, all transactions are supposed to be submitted in English; if possible translation is expected to be done before notification. However, if documents are crucial to the decision making process, the parties would be advised to translate through an embassy official. Critical summary translation may be accepted if they are informative enough.

9. Review periods

<p>A. Describe any applicable review periods following notification.</p>	<p>Notified transactions are reviewed for a minimum period of one month and a maximum of three months (although to an extent circumstantial) from the date of submission of a fully completed and relevant documents attached.</p> <p>There is no statutory maximum period for processing the application although administratively 3 months has been pegged. Otherwise, the flow of the process in Zambia depends on the cooperation of the parties by way of submitting comprehensive information as and when required by the Commission.</p>
<p>B. Are there different rules for public tenders (e.g. open market stock purchases or hostile bids)?</p>	<p>Not specifically, although generally notified post merger.</p>
<p>C. What are the procedures for an extension of the review periods, if any (e.g., suspended by requests for additional information, suspended at the authority's discretion or with the parties' consent)? Is there a statutory maximum for extensions?</p>	<p>The Commission has the discretion to extend the review period if not satisfied with the information available from the notification or where further of substantive investigations/assessment is still pending.</p>
<p>D. What are the procedures for accelerated review of non-problematic transactions, if any?</p>	<p>If preliminary assessment of a notified transaction reveals no competition concerns an interim authorization is given to the parties to proceed with the transaction subject to final authorization by the Board of the Zambia Competition Commission.</p>

10. Waiting periods / suspension obligations

<p>A. Describe any waiting periods/suspension obligations following notification, including whether closing is suspended or whether the implementation of the transaction is suspended or whether the parties are prevented from adopting</p>	<p>Before a notification is authorised by the Commission, the notifying parties are prohibited from proceeding with the transaction until all the necessary investigations and assessment tests are completed and thereafter a decision made either to block the transaction or give authorization. The parties can effect the transaction immediately they receive formal authorization notice from the Commission.</p>
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<p>specific measures (e.g., measures that make the transaction irreversible, or measures that change the market structure), during any initial review period and/or further review period.</p>	
<p>B. Can parties request derogation from waiting periods/suspension obligations? If so, under what circumstances?</p>	<p>Parties whose notified transaction is deemed to have no competition concerns may be given interim authorisation after preliminary assessment to proceed with their transaction subject to final approval by the Board of the Zambia Competition Commission. In this case, the parties may proceed to effect the transaction, but at their own risk.</p>
<p>C. Are the applicable waiting periods/suspension obligations limited to aspects of the transaction that occur within the jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent do they apply to the parties' ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance (e.g. request for a derogation from the suspension obligations, commitment to hold separate the local business operations, escrow agents.)</p>	<p>The applicable waiting period/suspension obligations of the notified transaction are limited within the Zambian market and it does not apply to the parties' ability to proceed with the transaction outside the Zambian jurisdiction.</p>
<p>D. Are parties allowed to close the transaction if no decision is issued within the statutory period?</p>	<p>There are no statutory waiting periods therefore, parties cannot arbitrarily effect the transaction but may close subject to a Commission decision.</p>
<p>E. Describe any provisions or procedures available to the enforcement authority, the parties</p>	<p>Commission officials and the merging parties may agree. Otherwise there are no statutory provision or proceedings currently in place.</p>

<p>and/or third parties to extend the waiting period/suspension obligation.</p>	
<p>F. Describe any procedures for obtaining early termination of the applicable waiting period/suspension obligation, and the criteria and timetable for deciding whether to grant early termination.</p>	<p>There are no statutory provisions, but generally termination can be requested by the applicant/notifiers at any given time by way of notice to the Commission to this effect.</p>
<p>G. Describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).</p>	<p>There are no provisions or procedures under the Act, as a merger or acquisition without clearance is null and void ab initio and no rights or obligations on either merging parties is legally enforceable in Zambia.</p>

11. Responsibility for notification / representation

<p>A. Who is responsible for notifying – the acquiring person(s), acquired person(s), or both? Does each party have to make its own filing?</p>	<p>Any party to the transaction or their appointed representative can notify. The parties may lodge in a joint notification. However, if for example, two or more independent players intending to separately takeover a competitor, then each have to lodge a separate notification.</p>
<p>B. Do different rules apply to public tenders (e.g. open market stock purchases or hostile bids)?</p>	<p>No</p>
<p>C. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?</p>	<p>There are no specific rules. Usually parties appoint local and/or multinational law firms to represent them.</p>

<p>D. How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?</p>	<p>A letter from the party/parties has to be presented to the Commission on granting of power of attorney or other representation. Official communication from any of the merging parties would generally suffice for this purpose.</p>
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12. Filing fees

<p>A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined (e.g., flat fee, fees for services, tiered fees based on complexity, tiered fees based on size of transaction)?</p>	<p>Merger notification filing for all enterprises is 0.1% of the combined turnover or assets (whichever is higher) of the merging parties. For negative clearance of mergers is about US\$ 2, 500. The fees are derived from a Statutory Instrument No. 46 of 2006 issued by the Minister of Commerce, Trade & Industry. Enterprise defined as “SMEs” under the Small Enterprise Development Act CAP 425 of the Laws of Zambia are exempted from paying the fees.</p>
<p>B. Who is responsible for payment?</p>	<p>Any party or their (joint) representative</p>
<p>C. When is payment required?</p>	<p>Payment of the applicable fee is required to be submitted together with the notification form.</p>
<p>D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?</p>	<p>The Commission accepts payment in cash or cheques. Electronic bank transfers may also be made to the Commission’s bank account.</p>

13. Confidentiality

<p>A. To what extent, if any, does your agency make public the fact that a pre-merger notification filing</p>	<p>The Commission announces all the filed notification but confidential information (as marked by the parties) is not divulged to the public.</p>
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was made or the contents of the notification?	
B. Do notifying parties have access to the authority's file? If so, under what circumstances can the right of access be exercised?	The parties may have access to the file as long as they give prior notice. As for the Commission working papers (investigation reports, assessment reports, staff papers etc) these are not accessible to the parties while the processing is going on but after approval. Adverse preliminary findings are availed to the parties for them to address before the Commission makes a final determination. Documents or other information from third-/interested parties that are market confidential are not readily accessible to the parties or the public.
C. Can third parties or other government agencies obtain access to notification materials? If so, under what circumstances?	Third parties and other interested parties can have access to the notification materials and other information that is not marked as confidential. Commission staff working documents may not be readily available before conclusion of investigation/processing period and official position on a transaction is made public.
D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.	YES, on the Form ZCC 5, parties are requested to clearly mark the information and documents submitted that they are kept in confidence. Otherwise, the non-confidential parts of the notification forms are accessible by the public.
E. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?	There are no formal agreements per se but there is a requirement for such an exchange under the Competition Regulations & Rules of the Common Market for Eastern and Southern Africa (COMESA). Generally, competition authorities in COMESA and the Southern African Development Community (SADC) have strong informal links through which information is exchanged.
F. Can the agency exchange documents or information with other reviewing agencies? If so, does it need the consent from the parties who have submitted confidential information to exchange such information?	The Commission is able to exchange information with its cooperating competition authorities where a similar transaction is taking place or took place. All information except that marked confidential may be exchanged. Exchange of confidential information would ordinarily occur subject to the consent from the parties. Although such consent is not legally binding on the Commission.

14. Transparency

A. Does the agency publish an annual report? Please provide the web address if available.	YES, annually. Some may be accessed at www.zcc.com.zm
B. Does the agency publish press releases related to merger policy or investigations?	YES, press releases related merger investigations are done before and after each sitting of the Board of the Zambia Competition Commission while press releases on merger policy are done on a regular basis
C. Does the agency publish decisions on why it cleared / blocked a transaction?	YES, in annual reports and press releases

15. Sanctions/penalties

A. What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods/suspension obligations?	Upon conviction by court of law, a penalty of 10 million Kwachas (US\$ 2,500) or a jail term not exceeding 5 years or to both are contained under Section 8 of the Act.
B. Which party/ies are potentially liable?	The one who in the absence of authority from the Commission whether acting as a principal or agent and whether by himself or his agent participates in effecting a merger or an acquisition
C. Can the agency impose/order these sanctions/penalties directly, or is it required to bring judicial action against the infringing party? If the latter, please describe the procedure and indicate how long this procedure can take.	The Commission is required to bring judicial action against the infringing parties. The Commission upon establishing infringement is required to sue the erring parties in a court of law for sanctions/penalties to be meted out. The time period required to seek sanctions/penalties is not fixed and is mainly depended on the efficiency of the independent court process.

16. Judicial review

Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.

All decisions made by the Commission can be appealed against (30 days after decision is made by the Commission) to the High Court of Zambia, subject to a further appeal to the Supreme Court (see Section 15 of the Competition and Fair Trading Act).

17. Additional filings

Are any additional filings/clearances required for some types of transactions, e.g., sectoral regulators, securities regulator?

Yes, where e.g. the ownership or company name is changing, there may be clearance required from the Registrar of Companies, licence change with the Central Bank, Communication Authority, Energy Regulation Board, etc.

18. Closing deadlines

When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized?

No there is no statutory time period

19. Post merger review of transactions

Can the agency reopen an investigation of a transaction that it previously cleared or allowed to proceed with conditions? If so, are there any limitations, including a time limit on this authority?

Yes, if new information comes to the Commission's attention in the post merger period, or should it become aware that some or all of the information that was provided by the parties was incorrect, or incomplete, the Commission has the powers to revoke authorisation of any transaction and institute new investigation. There is no limitation to a period in which the Commission is expected review its decision. The STATUTE OF LIMITATIONS ACT of the Laws of Zambia gives general guidelines and principles, with a maximum of 6 years to review matters of a civil nature.

